No. 8[redacted]57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ALBERTO VARGAS,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Scheffer Printing Company, Del. 7171

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alberto Vargas, the plaintiff-appellee below, respectfully prays that a writ of certiorari be issued out of this Honorable Court to review the judgment (R. 812) of the Circuit Court of Appeals for the Seventh Circuit entered February 27, 1948, reversing the order of the United States District Court for the Northern District of Illinois, Eastern Division, setting aside a contract between petitioner and Esquire, Inc., and remanding the case with instructions to dismiss the complaint.

Opinions below.

The opinion of the Trial Court is unreported. It appears at pages 775-783 of the record.

The opinion of the Circuit Court of Appeals (R. 798-811) is reported in 166 Fed. (2d) 651.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 27, 1948. Petition for rehearing was timely filed on March 12, 1948. It was denied on April 6, 1948. The jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 26 Stat. 828, Ch. 517, Sec. 6, as amended, 36 Stat. 1157, Ch. 231, Sec. 240, 43 Stat. 938, Ch. 229, Sec. 1, Title 28 U. S. C. A. Sec. 347. This petition is timely filed in accordance with 26 Stat. 828, as amended, Title 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

I.

(1) Whether a Circuit Court of Appeals, in reversing a case tried by the court without a jury where the evidence is almost wholly oral and adduced from witnesses in open court, is precluded by Rule 52 (a) of the Rules of Civil Procedure from ignoring voluminous and detailed findings of fact of the trial court, and from hearing the case as if *de novo* and making its own statement of facts as the basis of its decision.

(2) Whether this court will exercise its power of supervision over a Circuit Court of Appeals and correct its judgment reversing the trial court, in a case where it appears that the judgment is arrived at through improper and capricious violation of Rule 52 (a) of the Rules of Civil Procedure.

(3) Whether this court will exercise its power of supervision over the Circuit Court of Appeals where such court, on review of but one issue in a declaratory judgment action of which the lower court has taken jurisdiction but which has not been completely tried, has, on reversing the trial court's order setting aside a certain contract in question, peremptorily and of its own motion remanded the case with directions to dismiss the complaint instead of instructing the trial court to proceed with the declaration of the rights of the parties in conformity with the opinion of the court.

Specification of Errors Relied upon.

We respectfully submit that the court below erred:

1. In failing to affirm the decision of the trial court.
2. In ignoring the findings of fact of the trial court.
3. In not finding the findings of fact of the trial court were not clearly erroneous.
4. In not holding that the findings of fact of the trial court supported the conclusion of law that a relationship of especial trust and confidence existed between plaintiff and David A. Smart.
5. In remanding the cause to the trial court with directions to dismiss the complaint.

STATEMENT.

Plaintiff, a citizen of Illinois, on February 11, 1946, filed a declaratory judgment action against defendant, Esquire, Inc., a Delaware corporation, asking that the court inquire into and declare the rights of the parties under a situation which had arisen as regards a certain contract between the parties dated January 1, 1944. Mr. Vargas, the plaintiff, was 48 years old at that time.

This contract bound plaintiff, an artist, to furnish his pictures to defendant exclusively for a period of 10½ years and to furnish pictures for no other publication for three years thereafter; to give up the use of his name "Varga" at the end of his contract; to furnish a picture a week, thus in effect doubling the amount of work he had previously been doing for Esquire, Inc., and his pay, from all known information, was to be less than he had received in the last previous year of employment. The evidence is undisputed that it ordinarily took plaintiff from ten days to two weeks to complete a picture. The plaintiff, under this contract down to January 1, 1946, furnished the drawings reproduced as the "Varga Girl" in defendant's publications. Early in January 1946 he advised the defendant that he was not bound by said contract and would no longer perform under it. He furnished no further pictures to defendant.

Plaintiff in his complaint alleged that the contract in question had been obtained by defendant through the breach of a relationship of trust and confidence fostered and built up in plaintiff by defendant through its President, David A. Smart. Plaintiff further contended that

by reason of the said breach of this confidential relationship he had been induced to sign said contract without knowing its contents; that said contract, as to him, was unfair and inequitable and that he had refused longer to perform thereunder.

He asked that the court inquire into and declare the rights of the parties in relation to said contract and upon said inquiry that it find and declare the same null and void; that defendant be decreed to pay to him sums due for pictures delivered; that an accounting be had between the parties and that defendant be enjoined from interfering with the employment of plaintiff by others.

The defendant contended no relationship of trust and confidence existed; that the contract was fairly entered into, was valid and should be so held. In its counterclaims it asked the court to enforce the negative covenants of said contract by enjoining plaintiff from furnishing pictures for others and for a money judgment for a debt alleged to be due from plaintiff to defendant.

The court determined that the matter of the validity of the contract should be tried first. On a motion of defendant to limit the issues to be tried by the jury it decided that the issue of the validity of the contract would be tried by the court without a jury (R. 39). It heard the evidence on this issue of the case and at the conclusion thereof rendered its oral opinion (R. 765); made findings of fact (R. 775) and made conclusions of law (R. 784).

The court on the basis of its findings of fact, concluded a relationship of especial trust and confidence did exist between plaintiff and David A. Smart, and that said David A. Smart violated said relationship at the time of entering into said contract in that he had not dealt fairly with

plaintiff. It further found that said David A. Smart at the time said contract was entered into, for the purpose of inducing plaintiff to sign the same, misrepresented to plaintiff matters of a material nature concerning said contract and that plaintiff, relying thereon, signed the contract, not knowing or understanding its contents. The contract was found to be unfair and inequitable as regards plaintiff. The court ordered it set aside (R. 774). Defendant appealed. The court deferred hearing the balance of the case pending such appeal.

The Circuit Court of Appeals by a divided court reversed the order of the trial court and remanded the case to that court with directions to dismiss the complaint (R. 812). A petition for rehearing was filed and denied. The majority of the court were of the opinion plaintiff had not established a relationship of trust and confidence by the proof required by the applicable law, and that the contract could not be avoided on the ground of fraud. It stated the decree of the lower court is without evidence to support it.

A dissenting opinion was filed by Judge Major. He stated that the majority of the court in violation of Rule 52 (a) of the Rules of Civil Procedure had entirely disregarded the findings of fact of the trial court; that it had improperly proceeded to hear the case *de novo* on the record and made its conclusions in complete disregard of the findings of fact of the trial court; that the findings of the trial court were completely proved; that no more complete case establishing fiduciary relationship could have been presented by plaintiff.

A petition for rehearing was timely filed and a reply filed thereto. This petition was denied.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

I.

The Circuit Court of Appeals Has Decided a Question of Importance under Rule 52 (a) of the Federal Rules of Civil Procedure in a Manner in Conflict with the Decision of This Court in United States v. United States Gypsum Co., 68 S. Ct. 525; 92 L. Ed. 556, and in Conflict with the Decisions of the Other Circuit Courts of Appeals.

The cardinal fact to be established in this case by the plaintiff was that a relationship of especial trust and confidence existed between the plaintiff and David A. Smart, defendant's chief executive officer. If such a relationship was established the burden was then cast on the defendant to prove the contract in question was fairly entered into on defendant's part.

Much of the testimony at the trial was aimed at establishing such a relationship on plaintiff's part and at refuting its existence on the part of defendant. This evidence is almost wholly oral and was adduced from witnesses on the witness stand. The taking of the oral testimony covered over seven full days in court and is transcribed in 550 pages of the printed record. The court heard and saw Mr. Vargas and Mr. David A. Smart, throughout the giving of their extended testimony.

The trial court delivered its opinion and decision (R. 765), stating clearly its views of the facts and the law applicable to the case. More important, it supported that opinion and its decision with extensive findings of fact. Many of these findings are detailed and pertain solely

to the evidence adduced before the court which tended to support the relationship of trust and confidence found by it.

The substance of the specific findings by the trial court on this score were:

1. Plaintiff, a Peruvian, was an artist. David A. Smart was the active head of defendant corporation and a man of wide and successful business experience. (Findings 6, 8, R. 776.)

2. Mr. Smart was the agent of defendant with whom plaintiff dealt in matters concerning his employment and compensation. (Finding 8, R. 776.)

3. From the time of the arrival of Mr. and Mrs. Vargas in Chicago Mr. Smart took an unusual interest in everything pertaining to their lives. (Finding 16, R. 778.)

4. He was always consulted about their places of abode, visited apartments they desired to rent and was consulted by them and advised them concerning the furnishing of their apartments. (Finding 17, R. 778.)

5. For 2½ years after July, 1940 he was a frequent visitor at their apartment. (Finding 18, R. 778.)

6. Soon after July 1, 1940 he advised plaintiff and his wife to go to the financial department of defendant to get any money needed by them for furnishing their apartment or for other purposes. (Finding 19, R. 778.)

7. Down to January 1, 1943 plaintiff received from defendant $3,419.229 in excess of his earnings under his then existing contract which defendant discharged without advising plaintiff of this act and without demanding repayment from him. (Findings 13, 21, 22, R. 777, 778.)

8. For the year 1943 plaintiff received from defendant $10,573.12 in advances and at the year's end $5,699.80

in excess of the amounts which plaintiff would have earned under his previous contract was discharged without notice or advice to the plaintiff of its act and without demanding repayment from him. (Findings 14, 21, 22, R. 777, 778.)

9. Plaintiff received from defendant among other things advances of $5,000.00 to bring his mother and sister from Peru to Chicago; $2,250.00 to buy a ring for his wife; $728.00 to buy a coat for his wife, as well as substantial sums to buy furnishings. (Finding 20, R. 778.)

10. After May 15, 1941, no accounting was ever made or had, nor repayment asked of any sum advanced to plaintiff by defendant. (Findings 21, 22, R. 778.)

11. Mr. Smart had complete control of plaintiff's work done for others, and plaintiff for his earnings from said work necessarily depended on the judgment of Mr. Smart. (Finding 24, R. 779.)

12. Mr. Smart had close personal supervision of plaintiff's work for defendant and guided and encouraged him in his work. (Finding 26, R. 779.)

13. During the year 1943 David A. Smart told plaintiff he would give him a new contract substantially better than he would have, had defendant exercised its option to extend his first contract. (Finding 25, R. 779.)

14. By his acts David A. Smart became and was the friend and adviser of plaintiff as regards his business and domestic affairs and invited and had the special trust and confidence of plaintiff far beyond the trust and confidence ordinarily existing between men associated in business as "employer and employee." (Finding 23, R. 779.)

15. Plaintiff at the time of signing the contract in question did not act as a free agent. ((Finding 38, R. 781.)

Each and every of these findings is supported by the evidence. Indeed the only one criticized by counsel for defendant in its brief was numbered 14 above. Of this they contended the evidence did not support so broad a finding.

That this court may by contrast have before it facts found by the Circuit Court of Appeals we quote from its opinion. Without in any way noticing the above findings of the trial court it stated concerning the relationship of especial trust and confidence (R. 800):

"Briefly the controlling facts shown from all the evidence were that Vargas was an artist in whom Smart was interested; that as a friend he advised Vargas and his wife (a native born American who handled his business affairs) as to their place of abode and the furnishing of their apartment; that Smart visited Vargas' home and had defendant advance such money as they might need to furnish their apartment and which they might from time to time require for various purposes; that Vargas believed in the honesty of Smart; that Vargas was given attention and supervision so as to make sure that his pictures were the best to be obtained from him; that efforts were made to see that he might work and live in agreeable and pleasant surroundings which would help him to work and enhance his prestige as an artist; and that Smart did what he reasonably could to satisfy the wants and desires dictated by Vargas' artistic temperament."

The difference between this statement of the facts and the findings of the trial court is sharply apparent. The court has in effect set aside every finding of fact of the trial court. And it has done this without mentioning even one finding or pointing out its infirmity, if any, as shown by the record.

The findings of fact of the trial court under the Illinois cases can lead to no other conclusion than that a relationship of trust and confidence existed. In *Commercial Bank* v. *Kloth,* 360 Ill. 294; *Seely* v. *Rowe,* 370 Ill. 336; and *Thomas* v. *Whitney,* 186 Ill. 225, it is stated that a confidential relationship exists where the *facts* reveal that trust is confided in one and accepted by him. In *Thomas* v. *Whitney,* 186 Ill. 225, the court states concerning the rule: "The only question is, does such a relation *in fact* exist." If the trial court's findings be accepted the relationship undoubtedly existed in fact.

Under the Illinois law the question whether this relationship exists is undoubtedly one of *fact solely,* not a question of law nor a mixed question of law and fact. The lower court found as a finding of fact it existed.

It was these findings and the inevitable conclusion drawn therefrom which came to the Circuit Court of Appeals for review. As an appellate tribunal in its review it is bound by and must follow Rule 52 (a) of the Rules of Civil Procedure. It was bound by the findings of the trial court unless they are clearly erroneous. It must further in considering the case give due regard to the opportunity of the trial court to see the witnesses and judge of their credibility.

This does not deny the right of review. The reviewing court's function is limited to what the courts through long experience have found just. The reviewing court may not do what was done here. It may not search the record as if trying the case *de novo,* reach a conclusion different from the trial court and conform its statements of facts accordingly, ignoring the findings of the fact of the trial court. In doing this it has violated the basic principles of review. It has interpreted and applied Rule 52 (a)

in this case in a way in conflict with the decisions of this Honorable Court and with the decisions of the other Circuit Courts of Appeals.

This court has lately passed upon the interpretation of Rule 52 (a) in the case of *United States* v. *U. S. Gypsum Co.*, 68 S. Ct. 525; 92 L. Ed. 556. Here the court stated, (92 L. Ed. Pg. 568), it was the intention of this rule to make applicable the prevailing equity practice and that the appellate court might reverse the findings of fact if "clearly erroneous"; that the findings of the trial court when dependent upon oral testimony, where candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The court observed that the findings were never conclusive, and that a finding was clearly erroneous, when, although there was evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This statement of the rule is that contended for by the petitioner. It bound the appellate court to accept the findings of the lower court unless they were found vulnerable under the test laid down by this court. The rule in its application to the instant case is in no wise varied by the action of this court in the *Gypsum Company* case in setting aside certain findings of the lower court. There the findings based partly on oral testimony in response to leading questions were set aside as at variance with contemporaneous written documents and admitted facts. This the court had a right to do. The definite and firm conviction of a mistake having been made rested upon evidence pointed out by the court and was justified. The setting aside of the findings was only done after the finding was noted and the error pointed out.

The court in that case assuredly does not sanction by word or act what was done by the reviewing court in the instant case. It does not say or intimate that a reviewing court, in a case where the testimony is largely oral, without noticing findings of fact, may reverse a lower court because on the review of the whole record it does not agree with its judgment.

In each circuit the Circuit Courts of Appeals have recognized (1) They may not inquire to ascertain other than whether a finding is clearly erroneous; (2) They may not set aside a finding of fact merely because the reviewing court would have found differently in the record; (3) They may not try the case *de novo*: *Manning* v. *Gagne,* 108 Fed. (2d) 718, (1st Circuit); *Corbett* v. *Halliwell,* 123 Fed. (2d) 331, (2nd Circuit); *Katz Underwear Co.* v. *U. S.,* 127 Fed. (2nd) 965, (3rd) circuit); *Guilford Construction Co.* v. *Biggs,* 102 Fed. (2d) 46, (4th Circuit); *Sundt* v. *Turman Oil Co.,* 107 Fed. (2d) 762, (5th Circuit); *Andrew Jergens Co.* v. *Conner,* 125 Fed. (2d) 686, (6th Circuit); *Storby* v. *Armour & Co.,* 107 Fed. (2d) 499, (8th Circuit); *Occidental Life Insurance Co.* v. *Thomas,* 107 Fed. (2d) 876, (9th Circuit).

The courts unanimously recognize the salutary purpose of the limitations of this rule on their review of the findings of fact and strive to observe them. It is of utmost importance that the rule be maintained and not disregarded as in the instant case. The action of the Circuit Court of Appeals in this case if permitted to stand would sanction an entire reversal of the principles governing review. It would become a rule of whim and caprice rather than one guided by the rules found just and established for the reviewing courts. The action of the Circuit Court of Appeals in this case calls for a review by this Honorable Court.

Except for the lip service rendered to the rule by the court at the close of its opinion, it might be said the court had entirely disregarded the rule. Here the court said (Rec. 805) it was not unmindful of the fact that the trial judge heard and saw the witnesses and that his decree should not be disturbed unless clearly erroneous, but that nevertheless they thought the decree was without evidence to support it and should be reversed. This does not in any sense correct the court's error. Its whole opinion shows unmistakably an application of the rule as pointed out above herein. The fact that its action is a declared application of the rule renders only more important a review by this court.

II.

In Its Improper and Capricious Contravention of Rule 52 (a) of the Rules of Civil Procedure the Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as to Require the Exercise of This Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

We have stated heretofore the salient terms of the contract as regards plaintiff. It may well be an onerous contract to him and involves the probable remainder of his useful life. It is personal and if unsatisfactory may amount to virtual slavery for a long period of time. It assuredly would keep him at a continuous and arduous task for 10½ years. A contract taking so much of a human life, should command rapt attention from a court. There would have to be strong reasons to impel any person to enter into such a contract. Indeed, it seemed of such a nature that, the trial court found (Finding 46, R. 781), that if plaintiff had known and understood its terms and the truth of the matters misrepresented to him and withheld from him, he undoubtedly would not have signed it.

Plaintiff contends he signed it only because of the existence of a relationship of trust and confidence between him and David A. Smart and the breach thereof by Mr. Smart. The establishing of the relationship of trust and confidence as contended for by plaintiff would have had the sole result of casting the burden of proving fairness in securing the contract on the defendant. As we said, the very terms of the contract demand fairness in securing it and the burden of fair dealing sought to be cast on defendant is one a just employer would gladly assume. Defendant, however, strenuously denies any relationship of trust and confidence and most strenuously insists all dealings were at arm's length. It in effect confesses a want of fair dealing and insists upon its right to overreach the plaintiff.

The court, we submit, should in such a case carefully balance the scales of justice. A court of equity should look impartially and with the utmost judiciousness at a complaint involving the fairness of such a contract. A court of review should use care to be guided in its decision by the rules laid down for its observance.

This the majority of the Circuit Court of Appeals did not do. That it contravened Rule 52 (a) of the Rules of Civil Procedure cannot, we submit, be questioned.

We insist this was an improper and capricious disregard of the rule. The court knew well this rule and its limitations. The majority had sat on several cases where Rule 52 (a) was correctly laid down and applied. In few cases before the Circuit Courts of Appeals are there as vigorous and pointed a dissent as that of Judge Major here. This dissent pointed out not only the error of procedure and of law, but gave the evidence supporting the findings of fact of the trial court. In the face of its atten-

tion being thus directed to its error the majority persisted in its action.

It has been stated that this court will exercise its power of supervision only when the respect for the federal courts is endangered. We submit such a situation exists here. It can be little solace to Mr. Vargas serving under this inequitable contract that, as stated by Judge Major in his dissenting opinion, his was the case of all cases wherein the reviewing court has most completely disregarded the findings of fact of the trial court; that his is the case wherein the reviewing court has wrongfully tried the case *de novo;* that his is the case wherein, in spite of the fact that to attempt to present a more complete record establishing a relationship of trust and confidence would be futile, it was held no such relationship was established.

On this record the majority of the court has taken from plaintiff his freedom of action for a long period of time, not merely as its whim might direct, but by what we contend is a capricious action in disregard of its duty. The respect for the court must, we feel, inevitably suffer from such acts.

The procedure on review as regards the findings of fact is clear. It was the duty of the court to test these findings by the rule to determine if they were clearly erroneous. In each instance, it was to determine whether as to a finding, it had a definite and firm conviction it was wrong. Tested by this rule every single finding of the trial court must stand. It must be found for example that Mr. Smart took an unusual interest in everything pertaining to the lives of the Vargas; that he advised and consulted with them concerning the places of abode and was consulted about and advised concerning their furnishings; that money was advanced at his direction in inordinate sums

without any accounting or demand for repayment, etc. It is so throughout the whole of the findings enumerated above herein. If these findings are so tested and stand, the conclusion that a relationship of especial trust and confidence *in fact* existed must be reached.

Its duty to follow Rule 52 (a) was pointed out and known to the majority of the court. The only notice taken of Rule 52 (a) by the majority of the court, however, was the remark in their opinion to the effect that, although they were not unmindful of the trial court's function, the decree was without evidence to support it.

This statement merely emphasizes the error of the court. It clearly shows they had reached a different conclusion than the trial court on a search of the entire record, regardless of its findings of fact, and were reversing the case for that reason.

It may be insisted that the reviewing court had a definite and firm conviction the findings were wrong. If, when each finding is tested by the rule of procedure it is found not clearly erroneous, then a definite and firm conviction that they were wrong cannot exist. Otherwise the reason for that conviction could be pointed out in the evidence as was done by this court in the *Gypsum Co.* case.

In this matter the trial court heard and saw the witnesses. What its conviction was, as gathered from its hearing and seeing of the witnesses, is in its findings of fact, conclusions of law and decision. It is recognized that no appeals court can place itself in this same position and gain the feel of the case since this no appellate printed record can impart. This is one important reason for the rule in question limiting their action on review.

The plaintiff, we submit, had a right to have his case reviewed in accordance with the rules of Civil Procedure.

He had a right to expect that the Circuit Court of Appeals would be guided by known precepts and would not improperly depart from the path clearly marked for it. When the majority of that court, however, in the face of a protest by another judge, insist on pursuing a course clearly in error and prejudicial to plaintiff, this court should interfere and correct it.

III.

In Peremptorily and Arbitrarily Remanding This Case to the Lower Court with Directions to Dismiss the Complaint, the Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as Applied to Declaratory Judgment Actions as to Require the Court's Exercise of Its Power of Supervision to Prevent a Gross Miscarriage of Justice.

The trial court at the conclusion of its hearing on the validity of the contract between the parties, entered the order appealed from. It asserted it would then go ahead and try the rest of the law suit (Tr. 774). Since its further action, however, was largely governed by the final decision on the validity of the contract, it has continued the cause before it pending determination of the appeal.

The Circuit Court of Appeals (R. 798) asserts this was an action to cancel and set aside the contract. This, we submit, is erroneous. This was not a mere action for cancellation of the contract. It was a declaratory judgment action bringing before the court the whole situation arising in relation to the contract between the parties. The complaint sets up (R. 12) that plaintiff had advised defendant he would deliver to it no more pictures; that it was necessary that he work for others and that defendant had threatened to keep him from so working. The plaintiff stated he would be unable to work for others until the

rights of the parties had been determined by the court. The prayer of the complaint (R. 13) is that the court examine into and declare the rights of the parties in relation to the contract in question and in connection with such declaration that it find and decree the contract to be null and void.

It further prayed that defendant pay plaintiff for certain pictures and for an accounting; it asked that defendant be enjoined from interfering with and in any way preventing plaintiff's employment by others. It concludes with a prayer for general relief.

Defendant answered admitting it would attempt to keep plaintiff from working for others and that it might be impossible for plaintiff to get work until the rights of the parties were determined by the court (R. 26).

While it was plaintiff's contention that the contract was null and void, the complaint contemplated that the court might not so find. The respective rights of the parties still remain to be determined in the event the contract be sustained. We feel confident the court will not by mandatory order compel plaintiff to make and deliver pictures to defendant. The contract contains negative covenants against plaintiff working for others. There is to our mind a grave question as to the validity of these negative covenants in the contract. There is the further question as to whether the negative covenants in the contract will be enforced to any degree. As set up in the complaint, plaintiff in order to work for others asks the court to define his rights at this time rather than having a contest between the parties after he has begun so to work. As pointed out in the complaint (Tr. 12), one using his drawings will have to invest a large sum before any product can be published to bring about such a contest. To settle the rights

of the parties without jeopardizing that sum was the object of this suit and such is the fundamental concept of the declaratory judgment act.

The court has a discretion in exercising its judgment as to whether to entertain a declaratory judgment action. It may, however, not abuse that discretion. In this cause where the trial court received and entertained the action it was, we submit, for it to say whether it would continue to entertain it and proceed in the matter. For the Circuit Court of Appeals peremptorily, and without a clear conception of the facts, to order the complaint dismissed is an arbitrary and unwarranted exercise of its authority.

This action is not in harmony with the declaratory judgment act or the decided cases arising thereunder, *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Brillhart* v. *Excess Insurance Co. of America,* 316 U. S. 491. The court has, however, made no decision concerning that act. It has in fact given no reason for its action in so remanding the case. This action alone in view of the trial court's action was error.

The petitioner presented a justiciable controversy under the declaratory judgment act to the court for decision. That controversy was present whether the court found the contract valid or invalid. The lower court had assumed jurisdiction and was holding the case to fully define the rights of the parties.

The lower court has been reversed as to its decision on the single point of the validity of the contract. It should be permitted to determine the other questions upon the basis of its validity. Not to permit it to do so in effect nullifies the declaratory judgment act. Upon this state of the record the Circuit Court of Appeals by its direction to dismiss arbitrarily and without assigning any reason

takes from the court the jurisdiction it has assumed. This was done without the matter being brought before it as a matter of review and without it being raised by motion or otherwise. For it thus of its own motion to dismiss plaintiff's further action before the lower court is an unjustifiable abuse of its authority. The court should interfere to prevent such action becoming a guide for future action in disparagement of the declaratory judgment act.

CONCLUSION.

It is respectfully submitted that the writ of certiorari requested herein should be granted.

Respectfully submitted,

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No. 57

ALBERTO VARGAS,

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF STATUTES AND COURT RULES CITED.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The sole question before this Honorable Court at this time is whether the petition for the writ of certiorari shall be granted. The merits of the controversy tried in the District Court we submit are not now being considered. The respondent in its brief as filed herein has entirely disregarded these facts. It seeks to prevail upon this court to look at the cause as if tried *de novo* on the whole record, disregarding the contentions made by petitioner. These contentions are based solely on the disregard by the Circuit Court of Appeals of the findings of fact of the trial court.

In like manner it sought to have the Circuit Court of Appeals try the case *de novo* and that is what was er-

roneously done by that court. These facts appear from repondent's admission in its brief filed herein and in other matters now before this court.

In respondent's brief at page 5 it is stated "It was respondent, Esquire's contention in the Circuit Court of Appeals that *the testimony presented wholly failed to support the Court's conclusions.*" Again at page 6 of the brief respondent states— "Respondent's contentions that the *evidence and findings wholly failed to support the decree* were upheld by the Circuit Court of Appeals." The respondent points to the opinion of the Circuit Court of Appeals wherein the court says— "We think the *decree is without evidence to support it;* hence it should not be allowed to stand." (Italics ours) (R. 805).

These assuredly are not statements evidencing a testing of specific findings to see if they should stand. It is the language of those intent on searching the record to see whether on that record they agree with the decision of the trial court.

Seeking to bring about this review of the entire record respondent's brief consists largely of its version of the pertinent facts in the case. It sets out these facts not with the intention of meeting the matters urged by petitioner in his petition filed herein, but rather in an attempt to persuade this court that, despite any error in procedure of the Circuit Court of Appeals on review, its decision is right on the merits and ought not be disturbed.

When stating facts, purportedly from the record, respondent's counsel invariably misstate and twist the facts; understate some, overstate others; include that which is helpful and omit that which appears harmful to respondent's cause.

In essential respects the statement made by them is greatly at variance with the record. Their statements have no value. It was the influence of such prejudiced presentations on review which it was the purpose of rule 52 (a) to guard against. We shall hereafter comment further on most of these statements. To point out the error in each cannot, and indeed should not be done in this reply.

These statements of fact cannot lead to a denial of the petition. That must be decided on the issues presented and the answer thereto. Those issues simply stated are (a) Did the Circuit Court of Appeals err in its application to this case of Rule 52 (a) of the Federal Rules of Civil Procedure (b) Did that Court err in its consideration of the request for a declaratory judgment. It is respondent's reply on those points which must be considered.

ARGUMENT.

I.

The Findings of Fact Supporting The Trial Court's Conclusion that a Relationship of Trust and Confidence Existed Were Not Findings of Mixed Fact and Law.

The respondent admits those findings of fact set forth in those paragraphs numbered 1, 2, 6, 7, 8, 9, 10, 12 and and 13 on pages 9 and 10 of the petition to be true and valid findings. They should have been accepted and followed. We do not agree that they have no significance in the establishing of a relationship of trust and confidence. Each of the matters and things found in these findings would have a very definite effect in establishing the relationship contended for by petitioner. The Circuit Court of Appeals, however, brushed these findings aside as it did the others. It is of this petitioner complains.

The briefs in the Circuit Court of Appeals are not before the court. It is improper, we submit, for counsel for respondent in its brief to state as facts its contentions as made in its briefs before that court. Respondent states that it was its contention in the Circuit Court of Appeals that the findings of the trial court to the effect: (a) that Mr. Smart was always consulted about the Vargas' places of abode, visited apartments they desired to rent and advised them concerning the furnishing of their apartments; (b) that Mr. Smart for 2½ years after June 1940 was a frequent visitor at plaintiff's apartment; (c) that Mr. Smart had complete control of plaintiff's work done for others and that plaintiff's earnings from such work

necessarily depended on the judgment of Mr. Smart; were not supported by the evidence or that they were erroneous conclusions of law.

A perusal of their brief filed in that court would show no such contention was made. Judge Major in his dissent in the Circuit Court of Appeals states that the only evidentiary finding objected to by the respondent in its brief was that finding that Mr. Smart exhibited an unusual interest in everything pertaining to the life of the Vargas and that as to that finding respondent merely argued that there was no testimony to support so broad a finding (R. 808).

Not only did respondent not complain of these findings, but as a matter of fact none of these findings can be objected to as clearly erroneous because they are abundantly supported by the evidence. To argue that Mr. Smart did not advise concerning their apartments and their furnishings is to disregard the record. (R. 252, 261, 281, 282, 73, 74, 75). To say he was not a frequent visitor to their home because the home was also plaintiff's studio does not wipe out or even weaken the finding. The fact is that the Vargas saw a great deal of Mr. Smart.

The fact is not denied that Mr. Smart controlled Mr. Vargas' income from work for others. It is said that this was only true because Esquire, Inc. was also interested in that work. That cannot vary the fact of control in Mr. Smart and dependence on Mr. Vargas' part bringing plaintiff and Mr. Smart together, nor the fact that Mr. Vargas found Mr. Smart beneficial to him in handling these matters.

It is also true that the respondent certainly does not contend that the above findings were mixed findings of

law and fact, and that they might be disregarded on that ground. It is just as certain that the Circuit Court of Appeals did not in a single instance pass upon the sufficiency of the evidence to support these findings or find any of them clearly erroneous. It is inevitable to conclude they should have been accepted and followed.

Respondent states in its brief (Pg. 7) that the reviewing court considered and rejected as "clearly erroneous" the lower court's finding that Mr. Smart took an unusual interest in everything pertaining to the lives of the Vargas. We submit, at no place in the court's opinion is this finding even mentioned, much less specifically rejected. This is another finding amply supported by evidence which the Circuit Court of Appeals should have accepted and followed. As said by Judge Major, respondent itself in its brief in the Circuit Court of Appeals as to this finding merely stated that there was no testimony to support so broad a finding. We submit the admittedly correct findings in the case referred to above support this finding.

It must appear that one who was interested in the wife of Mr. Vargas coming here to be with him as Mr. Smart was (R. 53); who helped in choosing their apartments and advised concerning their furnishings; who visited at their combined home and studio; who arranged that they might have needed funds; who saw to it that advances were made for luxuries, without asking repayment; who had solely to do with Mr. Vargas' employment and was his close supervisor and guide in his work was interested in everything pertaining to their lives. Even though this interest was dictated by his own selfish interest, Mr. Smart made no declaration of that interest and the acts naturally inspired trust and confidence. That finding clearly should have been accepted and followed.

The most important finding of the trial court is one which distinguished this case from all the cases cited by respondent and the cases relied upon by the majority of the Circuit Court of Appeals. The finding is also one which indelibly stamps the conclusion of the trial court as correct. It is that numbered 14 on page 10 of the petition to the effect that David Smart by his acts became and was the friend and adviser of plaintiff as regards his business and domestic affairs and invited and had the special trust and confidence of plaintiff as regards such affairs far beyond the trust and confidence ordinarily existing between men associated in business as employer and employee. Respondent contends the court could refuse to follow this finding as a finding of mixed fact and law. But this is purely a *finding of fact.* There is nothing of law in it. Whether confidence is reposed on one side with resultant superiority in the other is at all times solely a question of fact. It is so held in the Illinois cases.

In *Commercial Merchants Bank* v. *Kloth,* 360 Ill. 294, at page 302, it was said in discussing this relationship "Where the *facts reveal* that trust is confided in one and accepted by him the fiduciary relation is created." In *Seeley* v. *Rowe,* 370 Ill. 336, at page 342, it was said in speaking of this relationship, "It includes all legal relations such as attorney and client, principal and agent, guardian and ward, and the like, and also every case in which a fiduciary relationship *exists in fact* where confidence is reposed on one side and domination and influence results on the other." Again in *Thomas* v. *Whitney,* 186 Ill. 225, at page 230, it was said "The only question is does such a relation *in fact exist?*" (Italics ours)

As shown by these cases the court's disregard of this

important finding of fact cannot be justified by erroneously denominating it a finding of mixed law and fact. It is a finding of fact which is amply supported by the record. It is furthermore a finding of fact peculiarly within rule 52 (a) of the Federal Rules of Civil Procedure, since it is the kind of a finding, resulting from what the courts call "the feel of the case", only gained by seeing and hearing the witnesses at the trial. No valid excuse can be offered for disregarding this all important finding.

The only possible finding that could be termed a mixed finding of fact and law is the finding that petitioner did not act as a free agent. If it be established that a relationship of trust and confidence existed, then this finding or conclusion necessarily follows. If petitioner, as a matter of fact, was under the influence of a fiduciary relationship, this conclusion that he did not act as a free agent follows, even though it is a mixed conclusion of law and fact.

We do not believe it possible precisely to define the relationship between petitioner and David A. Smart. It was not merely friendly, not merely that of employer and employee, not that of debtor and creditor. It was all of these and a great deal more. One of the prime considerations is that Mr. Vargas was an artist, foreign born and inexperienced in business affairs, while Mr. Smart was one widely experienced in business, who had proved a benefactor to Mr. Vargas. When Mr. Smart, as is undisputed, at the end of Mr. Vargas' first contract, told him that he was going to give him a substantially better contract and asked Mr. Vargas to leave it to him to work it out, those facts alone created a fiduciary relationship as regards Vargas' employment and concerning this very contract.

It is inconceivable how the court or respondent can call this merely a *friendly business relationship* in the light of what is admittedly in the record.

In view of this many sided relationship it was erroneous for the Circuit Court of Appeals in its opinion, and for respondent here, to state, as applying to this case, and particularly to state in the disjunctive, that a relationship of trust and confidence does not arise from belief in the honesty and integrity of a close or intimate friend, *nor* from the relationship of employer and employee, *nor* from the relationship of debtor and creditor. As we have shown, if all those relationships were stated in the conjunctive they would not describe the relationship between Mr. Vargas and Mr. Smart. Not one of the cases cited by respondent as stating the requirements for establishing a relationship of trust and confidence and relied upon by the majority of the Circuit Court of Appeals is decisive of this case. In none of them was it found that any trust was reposed by the parties in question. *Finney* v. *White,* 389 Ill. 374, lays down the rule as to the quantum of proof necessary to establish the relationship. In that case there was no proof whatsoever of trust reposed in the one sought to be charged.

It is stated by respondent (Resp. Br. 10) and by the Circuit Court of Appeals in its opinion (R. 801) that belief in the honesty and integrity of a close and intimate friend will not establish the relationship. Even though we contend the statement is not applicable here, it is certainly a startling statement. We submit it is not a true statement of the law. It assuredly is not supported by the cases cited in the court's opinion (R. 801). In *Bordner* v. *Kelso,* 293 Ill. 175, the evidence was that the parties scarcely knew each other and dealt at arm's length. There

was nothing in the evidence even hinting at a close and intimate friendship or any trust.

In *Higgins* v. *Chicago Title & Trust Company,* 312 Illinois 11, the parties were grain broker and customer. They had dealt at arm's length for years. There was nothing close or intimate in the relationship. The customer felt that Jackson Bros., the broker, would keep their promise in the same manner as one relies on the integrity of any reputable business house. This would not create a fiduciary relationship. But at the same time there was no belief in the honesty and integrity of a close and intimate friend involved in the case.

That the important findings in this case rest on oral disputed evidence is amply attested by the sharp conflict in the statements of the majority of the Circuit Court of Appeals and those of Judge Major and the trial judge. Indeed, it is difficult to see how any finding of fact can be called clearly erroneous when two judges could take the positive views of its correctness that were taken by Judge Major and the trial judge. We have demonstrated that these findings are not findings of mixed law and fact. The cases cited in respondent's brief to the effect that a reviewing court may reject findings which are mixed questions of fact and of law are not here in point. In none of them is the situation remotely analogous. In every one the conclusion was based on undisputed evidence. They truly involved mixed questions of law and fact or were merely interpretation of the law as applicable to undisputed facts.

In *Bogardus* v. *Commissioner,* 302 U. S. 34, the Board of Tax Appeals had held that for income tax purposes, under all the evidence in the case, certain sums given shareholders and others connected with a corporation

were additional compensation rather than gifts. The reviewing court held this holding reviewable, terming it a conclusion of law or a mixed question of fact and law. The basic evidentiary facts were undisputed. The only question was their interpretation under the law. This assuredly was reviewable. The question was whether the law was correctly applied to the fact. In the instant case there is no such problem, for if as *a matter of fact* there was trust reposed in Mr. Smart by plaintiff and accepted by Mr. Smart the relationship existed. It is wholly factual and evidentiary.

The cases of *Bell* v. *Porter,* 189 Fed. (2d) 117, and *Exmoor Country Club* v. *U. S.,* 119 Fed. (2d) 961, are likewise cases wherein the reviewing court made its own application of a taxing statute to undisputed facts. In *Becker* v. *Loews, Inc.,* 133 Fed. (2d) 889, the court saw a photoplay and read a book and decided, contrary to the trial court, there was no infringement of the book by the photoplay. The book and play were undisputed objective evidence. Clearly the court could read and interpret both. None of these cases touch upon the situation existing here.

In our introductory statement we pointed out respondent's very evident attempt here to persuade this court to overlook the matters urged in the petition and view the case on respondent's version of the merits. Respondent is not exculpated from its error by its erroneous insistence that the Circuit Court of Appeals did not try the case *de novo* but accepted many findings of fact, only rejecting those it found clearly erroneous. Again we submit the Circuit Court of Appeals did not point out a single finding as clearly eroneous. It accepted none of the findings of the trial court on the existence of a relationship of trust and confidence.

We are at a loss to understand what respondent means by its statement that the "high water mark" of plaintiff's evidence did not meet the required degree of proof of a relationship of trust and confidence under Illinois law. Whatever may be the high water mark of petitioner's evidence, the findings accepted by respondent in its brief filed herein substantially support the finding of a fiduciary relationship and that finding was not clearly erroneous. The inherent vice in the court's decision is that it disregarded these findings.

We urged as a basis for granting the petition that the Circuit Court of Appeals had applied rule 52 (a) of the Federal Rules of Civil Procedure contrary to the decision of this court in the case of *United States* v. *U. S. Gypsum Co.,* 68 Sup. Ct. 525. Respondent in its brief at page 11 states that case to hold that the court may set aside all findings of fact if on a review of the entire record it is convinced those findings are wrong. We submit that is not the holding of the *United States* v. *U. S. Gypsum Co.* case. That case held a finding may be set aside if not supported by substantial evidence, or, if supported by evidence, if the reviewing court on the entire evidence was left with a definite and firm conviction that an error had been committed. We submit this definite and firm conviction referred to must be one of reason, not one of caprice. It must be based on the record, not on the mere fact that the reviewing court for undisclosed reasons does not agree with the result reached by the trial court. This court by its holding in the *United States Gypsum Co.* case did not intend to repeal rule 52 (a) of the Federal Rules of Procedure. That must be the result of that decision if the action of the Circuit Court of Appeals in the instant case be affirmed. We respectfully submit that it

is imperative the action of the Circuit Court of Appeals be corrected by this Honorable Court.

II.

The Improper and Capricious Action of the Circuit Court of Appeals in Disregarding The Findings of the Trial Court Was Not Justified.

Petitioner urged that the Circuit Court of Appeals in disregarding the requirements of Rule 52(a) of the Rules of Civil Procedure had so far departed from the accepted and usual procedure as to require the exercise by this court of its power of supervision over that court.

It is petitioner's theory of this case that the trust and confidence reposed in Mr. Smart by petitioner was violated by him. The question in the case is not a question of whether Mr. Vargas could read or write or whether he or his wife had an opportunity to read the contract before signing. The case proceeded on the assumption Mr. Vargas could read and did have the opportunity to read the contract. Petitioner contended that the trust and confidence he had that Mr. Smart would treat him fairly in regard to the contract blinded him in reading the contract just as surely as sand thrown in his eyes would have done.

There is not one scrap of evidence that he understood the contract. All the evidence points the other way. Here arises the significance of the trial court's finding that if he had known the facts he undoubtedly would not have signed the contract. (Finding 46; R. 781).

It is petitioner's theory that this position of trust and confidence being shown, the burden was upon respondent to show full disclosure and fair treatment. This it did

not do. The court on appeal made much of the fact that Mr. Smart did not represent to Mr. Vargas how many pictures he was to make. Mr. Smart just as surely did not tell him his work was to be increased. It is admitted by respondent that there was no disclosure to Mr. Vargas of the fact known to Mr. Smart that the pay of Mr. Vargas under the contract would be less than he had had in the previous year. There was no disclosure to Mr. Vargas that his percentage in the business of Varga products was such that if sales of those products amounted to $1,000,000 he would receive but $2,500. The least Mr. Smart could have done was to state these and other known and very pertinent facts.

In a situation such as this he should have advised Mr. Vargas to secure outside counsel. Where he knew he was imposing the terms of this onerous contract on Mr. Vargas, he should have sent him the contract for study and perusal, not made of the signing a light and festive occasion lasting but a few minutes.

Mr. Vargas' slavery was not slavery assuaged by a magnificent income as respondent would have it believed. Mr. Vargas was paid as a contractor to turn out 52 pictures a year and maintain his studio on Lake Shore Drive in Chicago. He received for that purpose in the first year under this contract the sum of $13,827.87. This resulted in his incurring a deficit of $5,395.40 for the year. These funds were advanced by Esquire, Inc. As had been the custom before this contract was made, Mr. Vargas was given no statement of his account. He was not asked to repay the sum advanced. At the end of 1945 he had earned sufficient to reduce this deficit on the books of Esquire, Inc. by the sum of $1,355.88, to $4,039.52. Respondent now seeks to collect the latter sum from Mr. Vargas in this suit. (R. 30).

The petitioner complains of the Circuit Court of Appeals' disregard of the findings of fact of the trial court relating to the *fiduciary relationship* between Mr. Vargas and Mr. Smart. The court's action on *the issue of fraud* is not now before the court. Any discussion of the absence of actual fraud is not pertinent to the petition. The contract, petitioner claims, is invalid by reason of Mr. Smart's violation of his trust. That invalidity is not cured by the absence of actual fraud.

There was no waiver by Mr. Vargas of his right to object to the validity of the contract. As we have said, there is no evidence that he read and understood it prior to Dec. 15, 1945. It was on that day he first discovered the contract called for him to furnish 52 pictures each year. He must produce a picture a week for 10 years. Contrary to respondent's contention it does appear on page 155 of the record how much time was required to produce a picture. Mr. Vargas under this schedule must work night and day, conceiving, draughting, finishing picture after picture. This was an extremely onerous task even were the pay ample. It was beyond human endurance. It was of this Mr. Vargas complained to Mr. Smart. He did this as soon as he ascertained the facts. This was in conformity with the law.

Respondent has said it was the fact Mr. Vargas wished more money which led him to object to Mr. Smart about his contract. This is not the record. The record shows Mr. Vargas on learning the provisions of the contract, firstly and most vehemently protested as to the number of pictures he was required to produce for Esquire, Inc. (R. 125).

We could add much more as to the injustice wrought on Mr. Vargas by the improper action of the Circuit

Court of Appeals. We submit no court is justified in departing from the rules set up to govern its actions. This court, however, hesitates to exercise any power of supervision over the lower court unless the court's action tends to lessen respect for the court. We urged the personal injustice to Mr. Vargas as reflecting on the court. We believe the court must agree that the unwilling servitude to which it is sought to subject him is in effect a sentence to involuntary servitude. We submit petitioner is entitled to pursue his art as a means of livelihood, unfettered by shackles clamped on him through judicial error and caprice. Petitioner repeats his request for the exercise by the court of its power to supervise and correct the error of the Circuit Court of Appeals.

III.

The Circuit Court of Appeals Erred in Not Remanding the Cause For Further Proceedings in the Declaratory Judgment Action.

Respondent contends that all the relief asked by petitioner is based on the contract being null and void. We do not agree with that contention. It further states the prayer for relief as: (a) that the contract be declared null and void, (b) that plaintiff recover on a *quantum meruit*, etc. This statement of the prayer for relief entirely disregards the prayer as set up in the complaint. We quote from the prayer of the complaint (R. 13).

> "Wherefore the plaintiff asks:
>
> (a) *That the court examine into and declare the rights of the parties in relation to the contract Exhibit "A" hereto;* that in connection with such declaration the court find and decree said contract to be null and void and of no binding effect on the plaintiff.
>
> (b) That the court decree that the plaintiff, etc."

The first request is that the court examine into and declare the rights of the parties under the contract in question. The court assuredly is interested in the party's own contention as to that contract. For that reason the petitioner stated his contention that it was null and void and asked the Court so to find.

The complaint on its face shows that it is not merely a complaint to set aside a contract. It sets up fully the situation of the parties and asks for declaratory relief. Under it petitioner is entitled to a full declaration of his rights, including a declaration of his rights in the event the contract be held valid.

At present we are confronted with a situation where, although the contract be held valid, petitioner has not furnished pictures under it for almost two years, nor has respondent paid any sum to him pursuant to its terms. During that period the parties have engaged in constant and acrimonious litigation concerning this contract. This has resulted in much ill feeling between them.

The petitioner has been replaced as a feature artist in respondent's publication. Although respondent states in its brief it desires to continue under the contract, it has at other times made contrary declarations and is not, we believe, sincere in its present declaration. At all events, at all times since petitioner refused further to furnish pictures respondent at every opportunity, even in its brief herein, has insulted and slandered Mr. Vargas and his work. It at the same time has sought to take for itself and its agents all credit for the success of petitioner's work. To say that petitioner entirely lacks respect for the agents of respondent, with whom he must be associated in his work for respondent, is stating the case very mildly. Despite the legal effect of any decision rendered herein,

Mr. Vargas must at least view Mr. Smart as having violated the trust reposed in him; as having deceived him and imposed upon him. No human being could render the type of work demanded by the contract under such a situation.

We believe evidence at a further hearing will show respondent does not wish petitioner's services, and certainly that petitioner does not wish to serve respondent. We believe no court under the conditions of this case will subject petitioner to involuntary servitude. His rights must be declared that he may earn a livelihood. It is the law that a court will not by mandatory injunction compel petitioner to paint pictures for respondent. Respondent in its counterclaim has asked the court to restrain petitioner from furnishing any drawings to any other person. (R. 29). Petitioner contends that the court in this instance will not enforce the negative covenants of the contract. This is on the ground that where it appears concerning a contract of this nature that overreaching was present in the obtaining of the contract then, even though that overreaching was not such as would justify the setting aside of the contract, the court will not enforce the negative covenants of the contract. This rule must apply here.

In view of the nature of the complaint, its prayer for relief and the complex and tangled situation confronting the parties we submit that the petitioner is without doubt entitled to the further aid of the court in clarifying the situation and that it was error for the Circuit Court of Appeals summarily to order the complaint dismissed.

CONCLUSION.

We submit that nothing urged by respondent has established any reason for the denial of the petition herein. The discussion of the disregard by the Circuit Court of Appeals of the findings of the trial court has only served more clearly to point out its error. The conclusion as regards these findings is that by respondent's own admissions they are not only not clearly erroneous but on the contrary are clearly established by the evidence.

The facts discussed at length by respondent go only to the merits of the case. We do not agree in any particular with the respondent's statement of the facts. However, as we pointed out, they are not directly in issue at this time. It must appear to the court that the facts almost without exception are contested. That is all the more reason for strict observance of the rule in question by the Circuit Court of Appeals.

We further urge that the error of the Circuit Court of Appeals in ordering a dismissal of the case is apparent when we view the present situation of the parties. Observance of the Declaratory Judgment Act demands that a clear and detailed declaration of their respective rights be made.

Petitioner again respectfully requests that the writ be granted.

Respectfully submitted,

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Counsel for Petitioner.

EARLE E. EWINS
EDWARD S. PRICE
Of Counsel.

No. 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

ALBERTO VARGAS,

Petitioner,

VS.

ESQUIRE, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD R. JOHNSTON,
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ALAN R. JOHNSTON,
Of Counsel.

Scheffer Printing Company, Del. 7171

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioner, Alberto Vargas, has lived continuously in the United States for the past 32 years (R. 42). The trial court found that he writes, understands and speaks English very well. (Findings 6, 43; R. 776, 781.) Vargas commenced working for Esquire in June of 1940 under a written contract for three years, at a salary of $75.00 per week. (Plf's Ex. 1; R. 711-713, 52) Vargas agreed to devote his entire time exclusively to Esquire. The contract provided that Esquire might sell drawings made by Vargas to outsiders, and, in the case Equire so elected, that Vargas would be paid, in addition to his salary, 50% of the net receipts from the sale of such drawings to outsiders.

Under this contract, Esquire had an option to renew for an additional three years commencing with July 1, 1943

for a salary of $150.00 per week; and in case of such renewal, Vargas was to receive 60% of the net receipts from any Vargas drawings which Esquire might elect to sell to outside companies. (R. 712)

Vargas' drawings, as published by Esquire, were successful and popular, and a harmonious association developed between Vargas and Esquire. Vargas earned under his first contract $8,225.00 for the year 1941 (Defd's Ex. 21, R. 736) and a similar amount for the year 1942 (Defd's Ex. 21, R. 737, 739). Vargas continued to work under his first contract until it expired on June 30, 1943. He was told that Esquire would not exercise the option but would work out and offer him a new contract more favorable than if the option had been exercised (R. 82, 452).

Vargas continued to draw his salary of $75.00 a week during the last half of 1943, but in addition asked for and was given cash advances for various purposes. In particular, Vargas, in June, 1943, requested that Esquire advance him enough money to enable him to bring his elderly mother and his sister from Peru to the United States for a visit, which he stated would require $5,000.00 (R. 79-80). Esquire accordingly advanced him the $5,000.00 and Vargas' mother and sister made the visit (R. 289-290, 348). Primarily because of this unusual advance, Vargas had, at the end of 1943, been advanced by Esquire $5,699.80 more than he would have received had he been paid strictly under the terms of his expired contract. (Finding 14, R. 777.) In order to wipe out Vargas' indebtedness preparatory to making a new contract, a formula was worked out by Esquire which credited Vargas with salary and other compensation for the year 1943 sufficient to wipe out this indebtedness and leave a small balance of $565.85 owing to Vargas, which was paid him.

(Finding 14, R. 777.) Because of this extra compensation, which was tantamount to a bonus, Vargas' earnings for the year 1943 were $15,242.59, or almost double his earnings for the previous year. (Def's Ex. 21, R. 738, 616.)

Commencing January 1, 1944, Esquire began to pay Vargas a salary at the rate of $1,000.00 per month (R. 82-83). On May 23, 1944, the parties signed their second contract, the one here involved (Plf's Ex. 2, R. 713-715, 100), which was by its terms retroactive to January 1, 1944. This contract in effect provided for Vargas a salary of $1,000.00 a month for the first eighteen months, with systematic increases periodically, the final compensation being $1,500.00 a month for the last eighteen-month period. The contract ran for ten and one-half years. Under it Vargas agreed to furnish Esquire twenty-six drawings each six months; to work exclusively for Esquire; and to furnish no art work for anyone competing with Esquire for three years after the termination of the contract. In addition to the foregoing payments, Vargas was to receive ¼ of 1% of the gross receipts received by Esquire from the sale of any calendars, playing cards or other by-products on which Vargas' art work was used. The names "Varga", "Varga Girl", and "Varga, Esq.", which names had been previously used under the first contract, were to belong exclusively to Esquire.

The contract was typewritten on letter size paper, double-spaced, and only three and one-half pages in length. All parts of the contract as to which Vargas now complains were read to him before he signed it (Findings 31, 55, R. 779, 783); and, in addition, he was handed the contract and he and his wife, who handled his business affairs (R. 181, 217), had an opportunity to read it over and study it before it was signed (Finding 44, R. 781).

Vargas signed the contract, and for nearly two years, or until January, 1946, received his compensation and performed his work in accordance with its terms without any complaint or protest whatsoever (Finding 54, R. 783). In fact, after it had been in force for a year and a half, he himself testified that he told Esquire's president he was well satisfied with it. (R. 121-122.) His earnings under the new contract for 1944 were $13,827.87, slightly less than the total amount he had received from Esquire in 1943. His 1943 payments, however, had included the non-recurring item of $5,000.00 advanced to him to bring his mother and sister to the United States. Vargas' earnings under the new contract for 1945 were $15,245.83, which exceeded his earnings for 1943. (Def's Ex. 21, R. 740-741.)

During the two years that Vargas worked under his new contract, Esquire continued to make him advances on request; and the relations between Esquire and Vargas were quite as cordial as they had been previously.

Suddenly on January 10, 1946, Vargas, after consulting a lawyer, came to David Smart, President of Esquire, and complained that his basic salary under the contract was too small. (R. 126-131.) He testified he asked Mr. Smart to write him a new contract under which he would be "happy". (R. 135.) Upon Mr. Smart's refusal to grant this request, Vargas rejected the contract and has furnished no drawings to Esquire since that time. (R. 132.)

ARGUMENT.

I.

The review by the Circuit Court of Appeals of this case was in accord with Rule 52(a) of the Federal Rules of Civil Procedure as interpreted by this Court in U. S. v. U. S. Gypsum Co., 68 Sup. Ct. 525, 92 L. Ed. 556, and in accord with the decisions of the Circuit Courts of Appeal.

Although the trial court concluded as a matter of law that David Smart, president of Esquire, stood in a fiduciary relation to Vargas (Conclusion 1, R. 784) and that the contract should be cancelled, (R. 784, 785) it was respondent Esquire's contention in the Circuit Court of Appeals that the testimony presented wholly failed to support the Court's conclusions. For this reason respondent Esquire's statement of facts in the Circuit Court of Appeals followed the testimony of the Vargases and assumed that it was true, except in those instances where the trial court made express findings contrary to Vargas' contentions. The District Court, for example, found against Mr. Vargas as to the most sharply disputed issue of fact in the case, namely, the date on which the disputed second contract was signed. Vargas and Mrs. Vargas testified that it was signed on May 23, 1945, (R. 95-96, 201-202, 299, 349) but the Court found (Finding 29, R. 779) as contended by respondent's witnesses, that the contract was actually signed on May 23, 1944. The effect of this finding of the District Court was to show that Vargas had worked and been paid under the questioned contract *without protest,* for a year and eight months after it was signed, and not merely eight months as Vargas claimed.

Respondent's contentions, that the evidence and findings wholly failed to support the decree, were upheld by the Circuit Court of Appeals, which said:

> "We are not unmindful of the fact that the trial judge heard and saw the witnesses and that his decree should not be disturbed unless clearly erroneous; nevertheless, under the circumstances here appearing, measured by the applicable law, we think *the decree is without evidence to support it;* hence, it should not be allowed to stand." (R. 805)

Petitioner has summarized in his petition some of the trial court's findings (Pet'n p. 9, 10) in fifteen numbered paragraphs. The findings summarized by petitioner in paragraphs 1, 2, 6, 7, 8, 9, 10, 12 and 13 were not disputed in either court below but are of no significance to petitioner's case. Some of them show that Vargas was well and generously treated by Esquire, particularly in the matter of cash advances against future earnings, but this is scarcely a matter to be held against Esquire.

Respondent contended in the Circuit Court of Appeals that the other findings listed by petitioner (paragraphs 3, 4, 5, 11, 14 and 15) were not supported by the evidence, or that they were erroneous conclusions of law.

Some of these "findings" go entirely beyond any testimony in the case. There is no testimony that the Vargases (Par. 4) *always* consulted Mr. Smart about their apartments or furnishings; their own testimony is that while at times they did, on other occasions they chose apartments and furnishings without consulting him (R. 252, 336, 264). The court's finding that David Smart was a "frequent visitor" at Vargas' apartment (Par. 5) fails to point out that Vargas' home or apartment was also his studio, where he drew his pictures; and is scarcely sup-

ported by testimony that Smart did not visit the studio *as often as once every two months.* (R. 340) Indeed Mrs. Vargas testified: "There were times when he would come two or three times in succession to see how the work was progressing; there were times when he didn't come for months." (R. 340). It is certainly not extraordinary that Mr. Smart called at the studio of one of his key artists five or six times a year, if he did, to see how a picture was progressing.

The Circuit Court of Appeals rejected as "clearly erroneous" the lower court's conclusory finding challenged by respondent, that Mr. Smart took an "unusual interest" in everything pertaining to their lives. (Par. 3) Mrs. Vargas had herself characterized Mr. Smart's interest in her husband and herself as follows: "He seemed to take a friendly interest in us." (R. 348) It was respondent's contention that a friendly interest in a key artist under contract is hardly peculiar, and does not give rise to a fiduciary relation. The Court of Appeals agreed that Esquire and its president had a legitimate interest in Vargas; in seeing that he had an agreeable place in which to do his work; and in seeing, if they could, that the wants and desires of his artistic temperament were satisfied. (R. 800, 801)

The trial court's finding that David A. Smart "had complete control of the work done by plaintiff for defendant to be sold by others," and that plaintiff for his earnings from said work necessarily depended on the judgment of Mr. Smart (Par. 11), failed to point out that all this was according to the plain terms of Vargas' *first contract* with Esquire, which contract was never at any time questioned by him. Under that contract, all art work drawn by Vargas, the employee, belonged to Es-

quire, the employer. When and if any was sold to outsiders, Vargas received his percentage, strictly under the contract (Plf's Ex. 1, R. 711-713). No claim is made that he did not always receive what he was entitled to.

The conclusions summarized in paragraphs 14 and 15 (Pet'n, p. 10) to the effect that David Smart invited and had the special trust and confidence of plaintiff far beyond that ordinarily existing between employer and employee (Finding 23, R. 779) and that at the time of the signing of the contract plaintiff did not act as a "free agent" (Finding 38, R. 781) are not proper findings of fact. They are properly conclusions of law, which have no presumption of correctness in the reviewing court, *and were properly labeled conclusions of law by the trial court.* (Conclusions 1 and 5, R. 784.) The Circuit Court of Appeals in discussing the trial court's conclusion of fiduciary relationship referred to it as a conclusion of law. (R. 799, 801.) At most, the conclusions that a fiduciary relation existed here and that petitioner did not act as a free agent are conclusions of mixed law and fact. As pointed out by this Court in the early case of *Ogilvie* v. *Knox Mach. Co.,* 59 U. S. 577, 18 How. 577, 15 L. Ed. 490, the question of the existence of fraud is always a mixed question of law and fact.

It is well established, as recently held by this Court in *U. S.* v. *U. S. Gypsum Co.,* 68 Sup. Ct. 525, 542, 92 L. Ed. 556, that in an equity action such as this, where the facts are found by the Court without a jury, an Appellate Court is not bound by the determinations of the District Court *on a mixed question of law and fact.* Other cases announcing the same rule with regard to the scope of review of questions of mixed law and fact are *Bogardus* v. *Comm. of Int. Rev.* (1937), 302 U. S. 34, at 39; 58 S. Ct.

61, 82 L. Ed. 32; *Bell* v. *Porter* (7th Circ., 1946), 159 Fed. (2d) 117, at 120; *Exmoor Country Club* v. *U. S.* (7th Cir., 1940), 119 Fed. (2d) 961, at 963; *Becker* v. *Loew's Inc.* (7th Cir., 1943), 133 Fed. (2d) 889, at 894; *U. S.* v. *Anderson* (7th Cir., 1939), 108 Fed. (2d) 475, at 479.

Furthermore, the finding of a fiduciary relation is even more clearly one of law, or, at most, of mixed law and fact under the law of Illinois, which holds that a fiduciary relation may never be established, except by "proof clear, convincing and *so strong as to lead but to one possible conclusion*". *Stewart* v. *Sunagel*, 394 Ill. 209, 68 N. E. (2d) 268; *Finney* v. *White*, 389 Ill. 374, 59 N. E. (2d) 859; and *Johnson* v. *Lane*, 369 Ill. 135, 15 N. E. (2d) 710.

Whether the proof of fiduciary relation in this case was indeed so clear, so convincing and so strong "as to lead to but one possible conclusion" was properly for the Circuit Court of Appeals to decide as to a question of law, or of mixed law and fact. Although this Illinois rule as to degree of proof in a case of this type is undisputed, the trial court appears to have wholly disregarded it; at least the trial court failed to include such rule among its conclusions of law.

It is therefore clear that the District Court's conclusions of law or of mixed law and fact as to the existence of a fiduciary relation, and that there was fraud in the execution of the contract were not binding upon the Circuit Court of Appeals, and in reaching contrary conclusions the reviewing court was acting within its proper powers of review as prescribed by Rule 52(a) of the Federal Rules of Civil Procedure. It therefore did not apply or construe Rule 52(a) contrary to the decisions of this court or of other circuits, as petitioner contends.

As the Circuit Court of Appeals held, the evidence in the record, together with the proper findings of evidentiary fact not found to be "clearly erroneous" showing a friendly business relationship between David Smart and Vargas, do not establish under Illinois law a relationship of special trust and confidence. *Finney* v. *White,* 389 Ill. 374, 59 N. E. (2d) 859.

Similarly, evidence of belief in the honesty and integrity of a close and intimate friend has been held insufficient to establish a fiduciary relation. *Higgins* v. *Chicago Title and Trust Co.* (1924), 312 Ill. 11, at 18-19, 143 NE 482; *Bordner* v. *Kelso* (1920), 293 Ill. 175, 127 N. E. 337. And evidence of employer-employee and debtor-creditor relationships is not sufficient to create a fiduciary relation. *Doheny* v. *Lacy,* (1901) 168 N. Y. 213, 61 N. E. 255; *Guffey* v. *Washburn,* 382 Ill. 376, 46 N. E. (2d) 971.

It is readily apparent that the Circuit Court of Appeals did not, as petitioner contends, try the case *de novo* and overrule all of the trial court's findings of fact. It obviously accepted most of the trial court's evidentiary findings; but found some of the findings discussed herein clearly erroneous, and concluded that the high water-mark of plaintiff's evidence, viewed in the light of the supported findings of the District Court, did not, as a matter of law, establish a fiduciary relation by that high degree of proof required by Illinois law. The Circuit Court of Appeal's conclusion (R. 801) that a fiduciary relationship did not exist between plaintiff and David A. Smart, as a matter of law, was of course, clearly in accord with Rule 52(a), which does not limit in any way the reviewing court's right to set aside conclusions of law of the trial court.

And even if these conclusions all be treated as pure findings of fact, the Circuit Court of Appeals was authorized by rule 52(a) to reverse them; for under the decisions of this court, the Circuit Court of Appeals has a clear right to set aside findings of evidentiary fact made by the District Court, if on a review of the entire record, the Circuit Court of Appeals is convinced the lower court's findings are wrong. In the case of *U. S.* v. *U. S. Gypsum Co.*, 68 Sup. Ct. 525, this court said that rule 52(a) authorized reviewing courts, in all actions tried upon the facts without a jury, to "reverse findings of fact by a trial court where 'clearly erroneous'". This court also said: "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court *on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis added).

The action of the Circuit Court of Appeals was clearly in accord with the rule.

II.

Petitioner has advanced no reason for granting certiorari cognizable under rule 38(5) of this court.

Opposing counsel suggests that by the reversal of the District Court some injustice may have been worked. They talk of Vargas' virtual "slavery" for ten and one-half years under this contract. A condition of slavery which provides to the slaving party an average salary of $15,000.00 per year over the period of the contract, (Def's. Ex. 25, R. 750, 556) plus a probably average $5,000.00 additional per year from the sale of by-products, (R. 413) is at least the type of slavery for which many prominent commercial artists are searching.

Petitioner seeks to create the impression that he was overworked under the terms of the contract. He states (Pet'n, p. 5) that it ordinarily took him from ten days to two weeks to complete a drawing, although he did not so testify at the trial and the Court made no such finding. On the contrary, the Court found that in 1944 plaintiff produced for respondent 49 drawings, (Finding 47, R. 782) without making any complaint at the time that he was overworked. This was at the approximate rate of one picture a week. Vargas also was able to get away for his usual month's vacation in 1944, as was his annual custom during his association with Esquire. (R. 182) In addition to the 49 drawings, Vargas testified that in the same year he had sufficient time to make "very many" original pictures to send to the boys in service overseas. (R. 195.)

Petitioner's statement that the new contract doubled his work is also incorrect. Under both contracts it was expected that he would devote his entire time to the production of pictures for Esquire. No particular number of pictures was specified in Vargas' first contract, this being unnecessary since he was an employee, required to devote his entire working time to Esquire. But as an independent contractor under the second contract, it was necessary to stipulate as to the number of pictures required. However, the record shows that the number of pictures produced under the second contract was not substantially larger than under the first contract (Finding 7, R. 782), considering the additional number of pictures Vargas drew for sale to outsiders under the first contract. (R. 34)

Petitioner is again grossly inaccurate when he states that his pay under the second contract was to be less than he had received the last previous year of employment. As

pointed out in our statement of the case, Vargas in 1943, as the result of Esquire crediting to him sufficient money to wipe out his overdrafts, received $15,242.59. (Def's. Ex. 21, R. 738) It was during that year, however, that he received the extraordinarily large advance of $5,000.00 to bring his mother and sister from Peru to the United States. He could scarcely have expected to receive such an advance again during the next year. In the first year under the second contract Vargas earned a total of $13,827.87 (Def's. Ex. 21, R. 740), and in the second year he earned $15,245.63 (Def's. Ex. 21, R. 741). Each year thereafter his earnings would have necessarily increased, because of the sliding scale of earnings.

It is inaccurate to state, as petitioner does (Pet'n p. 5) that he was required under this contract to give up the use of his name at the end of the contract. The agreement provided that the names "Varga", "Varga Girl", and "Varga-Esq." were to belong exclusively to Esquire. These were coined names, theretofore adopted and copyrighted by Esquire for use in connection with the publication and promotion of Vargas' art work. Petitioner's name is and has always been "Vargas". At the end of the contract he, of course, was free to use *his* name in connection with his work and to advise that he had drawn the "Varga Girl" pictures for respondent's magazine. He would in that way reap substantial benefit from the advertising and promotion he had received during his association with Esquire.

There is no evidence in the record to support the trial court's speculation (Finding 46, R. 781) that if the plaintiff had understood the terms of the contract he would not have signed it. Furthermore, the finding is without legal significance since the trial court found that Vargas and his wife, who was born in the United States and

handled his business affairs, were "both capable of reading and understanding the English language at the time of the execution of the contract" (Finding 43, R. 781), and "that prior to the signing of the contract the plaintiff was requested by David Smart to read the contract, and both the plaintiff and his wife had an opportunity to read the contract before the plaintiff signed it as a party and his wife signed it as a witness". (Finding 44, R. 781.)

It is well settled under Illinois law that unless a person's signature to a contract is secured by some fraudulent trick, which was not here contended, he cannot complain that the contract does not contain what he expected, when he is capable of and has the opportunity to learn of its provisions by reading it. *Bundeson* v. *Lewis,* 368 Ill. 623, at 633, 15 N. E. (2d) 520; *Upton* v. *Trebilcock,* 91 U. S. 45, at 50, 23 L. Ed. 203; *Morel* v. *Masalski,* 333 Ill. 41, at 47, 164 N. E. 205.

In the instant case the Court, by implication at least (Finding 33, R. 780), found as a fact that Smart read the contract to Vargas down to the third paragraph. No complaint is made by Vargas that Smart misread or misrepresented the first two paragraphs of the contract. The only terms of the contract about which the Court found Vargas made complaint up to the time of filing suit (Finding 55, R. 783), namely, the amount of basic salary and the number of pictures to be produced, were contained in the portions of the contract read to Vargas. Vargas testified that Smart gave him the contract and told him, "You can go over there and check up on what I say", and that he, Vargas, sat down with the contract in his hand "to see what was what." (R. 99.) This admission on the part of Vargas eloquently demonstrates the absence of an essental element of fiduciary relationship, i. e.,

reliance by the subservient party on the dominant party. Vargas admitted he was by himself with the simple three and one-half page (letter size) double-spaced typewritten contract in his hands for at least five minutes. (R. 101.)

Vargas' own witness, Mr. Bartizal, testified that Vargas was asked, after studying the contract for some time, whether he was ready to sign the contract and that he answered "Yes". (R. 679.)

It is difficult to imagine what David Smart could have done to inform plaintiff of the terms of the contract other than what he did. He read to plaintiff the salient provisions of the contract, including all of those provisions objected to by plaintiff at the time of repudiation. He asked him whether or not he had any questions concerning the provisions read to him. (R. 494). Vargas replied that he had none. (R. 494.) He requested Vargas to read the contract himself, and his United States born wife, who handled many of his business affairs, was given an opportunity to read the contract. (Finding 44, R. 781.) It was our contention in both the trial court and the Circuit Court of Appeals that even if a fiduciary relation was assumed to exist, still the defendant had met the burden cast upon it of showing that the contract was fairly entered into.

Petitioner now asserts that the action of the Circuit Court of Appeals, in holding him bound by a simple three and one-half page contract, with no fine print; a contract which petitioner willingly signed, after it was read to him, and after he and his wife had checked it over; a contract which petitioner has already performed for two years with admitted satisfaction; a contract under which he has earned over $15,000 a year and under which he

must necessarily earn at least $18,000 a year, in addition to his percentage bonus, is a "gross miscarriage of justice."

We submit, on the contrary, that any other result would permit petitioner to walk out from under his obligations, and appropriate *for himself alone,* all the benefits of the tremendous promotional work which he had admittedly received from Esquire. While petitioner would understandably prefer to do less work and receive even more money than his contract provides, his own testimony demonstrates the contract to be fair; and no effort whatever was made on the trial to show that Vargas' services were actually worth more than he had received under the contract in question. We submit that not only the law, but the equities of this case lie with the respondent, and that the decision of the Circuit Court of Appeals is manifestly just.

III.

The order of the Circuit Court of Appeals remanding the case with directions to dismiss the complaint was a proper order.

All of the relief sought by petitioner in his complaint was based on the fundamental premise that the court would declare the contract null and void. When the reviewing court by its decision declared the contract binding and in effect, all of the other relief sought by petitioner fell. The Circuit Court of Appeals was entirely correct in describing this action as one to declare null and void or to set aside the contract. This was unmistakably the relief sought by the complaint. Therefore, the Circuit Court of Appeals' order, remanding this case with directions to dismiss the complaint, is a proper order.

Petitioner's prayer for relief asks (a) that the contract be declared null and void; (b)that the plaintiff recover, on the theory of *quantum meruit,* the reasonable value of pictures furnished by plaintiff to defendant as part of his 1946 quota; (c) that plaintiff have an accounting; (d) that defendant be enjoined from interfering with or preventing the employment of plaintiff by others; and (e) that plaintiff have such other general relief as might be deemed proper. (R. 13.)

Considering the relief sought, it is apparent that no questions are left for determination now that the contract has been found to be valid and in effect.

Since the contract has been found to be in force, plaintiff has no right to be paid on a *quantum meruit* basis, for pictures delivered under the contract as is sought in subsection (b) of the prayer for relief. All pictures have been paid for in accordance with the provisions of the contract. Furthermore, even under the decision of the trial court cancelling the contract as of January 10, 1946 (R. 785) plaintiff was not entitled to any of the relief sought under this subsection. During 1945 plaintiff delivered to defendant no more than his quota of drawings. (Finding 47, R. 782; Def's. Ex. 27, R. 751-753, 586) Plaintiff was compensated under the terms of the contract up to the end of 1945, and no pictures were furnished by plaintiff to defendant thereafter.

Plaintiff is not entitled to an accounting, as sought under subsection (c) of his prayer for relief. The terms of the contract governed entirely the measure of his compensation. Defendant's Exhibit 21, Record 735-742, contains a complete statement of account from July 1, 1940 to March 31, 1946. A subsequent statement of account was furnished to petitioner's counsel on May 12 1947,

which showed the status of Vargas' account with Esquire as of March 31, 1947, and which also represents the status of plaintiff's account with defendant as of the present time. The accuracy of these statements of account have never been questioned by plaintiff.

The relief sought under subsection (d), namely, that defendant be enjoined from interfering with or preventing plaintiff from working for others, is also based on the assumption that plaintiff's contract with defendant would be voided. When plaintiff advised defendant that he would deliver no additional pictures, as alleged in his complaint (R. 12), he was acting on the advice of counsel that his contract was voidable. Since the Circuit Court of Appeals reached the opposite conclusion, it must be assumed that the plaintiff will now elect to perform the contract rather than breach it. As alleged in our answer (R. 26), it is unnecessary for plaintiff to seek work from others, since the defendant stands ready to accept performance from him under the contract here in question. The only real controversy here was whether or not the contract was valid and binding, which question has been fully decided by the opinion and judgment of the court below.

Where the court has found the issues against plaintiff in a declaratory judgment suit, after a full hearing on the merits, it may either enter a decree so determining the rights of the parties, or a decree dismissing the complaint. Which form of decree is entered is a mere matter of form, which will not be reversed on appeal. *Boyar v. Krech*, 73 P. (2d) 1218, 1220; 10 Cal. (2d) 207.

In essence the plaintiff complains that the dismissal of the complaint does not give him a declaration of rights. This is not so. The opinion of the Circuit Court of Appeals is a complete declaration of the rights of the parties.

It becomes a mere matter of form as to whether the complaint should be dismissed or the trial court should enter a formal decree reiterating the declaration of rights by the Circuit Court.

This court will not grant certiorari merely to correct the judgment of the court below as to a matter of form.

CONCLUSION.

It is respectfully submitted that the petitioner has shown no reason for the granting of a writ of certiorari to the Circuit Court of Appeals to review this case, and the issuance of the writ should be denied.

Respectfully submitted,

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